

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KENNETH LEE TAYLOR,

Petitioner,

v.

ROBERT AYERS, Warden,

Respondent.

No. C 07-4147 MMC (PR)

**ORDER DENYING APPLICATION
FOR CERTIFICATE OF
APPEALABILITY; DENYING
REQUEST FOR APPOINTMENT OF
COUNSEL**

(Docket Nos. 32, 33)

On August 13, 2007, petitioner, a California prisoner proceeding pro se, filed the above-titled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Thereafter, the Court, by order filed June 23, 2010, granted respondent's motion to dismiss the petition as barred by the applicable one-year statute of limitations. Petitioner has now filed a notice of appeal from the entry of judgment in respondent's favor, as well as an application for a certificate of appealability ("COA") pursuant to 28 U.S.C. § 2253(c) and Federal Rule of Appellate Procedure 22(b). Additionally, petitioner has filed a request for appointment of counsel.

"Determining whether a COA should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding." Slack v. McDaniel, 529 U.S. 473, 484-85 (2000). "When the district court denies a habeas petition on procedural grounds

1 without reaching the prisoner's underlying constitutional claim, a COA should issue when
2 the prisoner shows, at least, that jurists of reason would find it debatable whether the petition
3 states a valid claim of the denial of a constitutional right and that jurists of reason would find
4 it debatable whether the district court was correct in its procedural ruling." Id. at 484; see
5 James v. Giles, 221 F.3d 1074, 1077 (9th Cir. 2000). As each of these components is a
6 "threshold inquiry," the federal court "may find that it can dispose of the application in a fair
7 and prompt manner if it proceeds first to resolve the issue whose answer is more apparent
8 from the record and arguments." Slack, 529 U.S. at 485. Supreme Court jurisprudence
9 "allows and encourages" federal courts to first resolve the procedural issue. See id.

10 Here, petitioner, in his application for a COA, does not challenge the Court's finding
11 that the petition was not timely filed. Thus, for the reasons discussed in the Court's order
12 granting respondent's motion to dismiss, the Court finds petitioner has not shown that jurists
13 of reason would find it debatable whether the Court was correct in its procedural ruling.

14 Further, the Court finds unpersuasive petitioner's arguments in support of a COA.
15 Specifically, the Court finds the following asserted grounds lack merit: (1) that petitioner has
16 discovered new evidence of prosecutorial misconduct, (2) that the Court erred by finding the
17 "actual innocence" exception to procedurally defaulted claims did not require review of
18 petitioner's claims on the merits, and (3) that the Court erred by finding petitioner was not
19 entitled to an evidentiary hearing to develop facts he claims were not adequately developed at
20 trial, as well as facts pertaining to his claim of actual innocence.

21 First, petitioner's alleged discovery of evidence of prosecutorial misconduct is not
22 grounds for issuance of a COA herein. Rather, if petitioner has discovered evidence that he
23 believes entitles him to relief on any such additional claim(s), he must exhaust his state
24 remedies with respect to such claim(s) and then file a new federal habeas petition. Second,
25 the Court's finding that the actual innocence exception is not available to petitioner is not
26 subject to debate; specifically, the Ninth Circuit recently has made clear that there is no
27 actual innocence exception to the one-year statute of limitations for filing a federal habeas
28 petition. See Lampert v. Lee, 610 F.3d 1125, 1136 (9th Cir. 2010). Lastly, the Court's

1 denial of petitioner's request for an evidentiary hearing to develop underlying facts
2 pertaining to his trial and his claim of actual innocence is unavailing, for the reasons that
3 there was no impropriety in the Court's determination not to reach the merits of petitioner's
4 claims given the untimeliness of the petition, and, as noted, the actual innocence exception is
5 unavailable to petitioner.

6 Accordingly, for the reasons set forth above, petitioner's application for a certificate
7 of appealability is hereby DENIED, and petitioner's request for appointment of counsel is
8 hereby DENIED, without prejudice to petitioner's renewing both the application and the
9 request in the Ninth Circuit.¹

10 The Clerk shall forward this order, along with the case file, to the United States Court
11 of Appeals for the Ninth Circuit, from which petitioner may also seek a certificate of
12 appealability and such other relief as appropriate. See United States v. Asrar, 116 F.3d 1268,
13 1270 (9th Cir. 1997).

14 This order terminates Docket Nos. 32 and 33.

15 IT IS SO ORDERED.

16 DATED: January 3, 2011

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18 MAXINE M. CHESNEY
19 United States District Judge
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26 ¹Together with his application for a COA and request for appointment of counsel,
27 petitioner has submitted trust account documents that ordinarily would accompany an
28 application to proceed in forma pauperis. Petitioner, however, has not filed the required form
application to proceed in forma pauperis on appeal; consequently, the Court makes no
determination as to whether such status should be granted.